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No. 99-1184

In The

Supreme Court of the United States

LAURENCE MACK, Warden,

Petitioner,

v.

DAVID L. PARIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF DELAWARE, ALABAMA, ARKANSAS, CALIFORNIA, ILLINOIS, INDIANA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AND THE COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

As allowed by Supreme Court Rule 37, the *amici curiae* States, through their respective Attorneys General, submit this brief in support of Question 1 presented by petitioner. The *amici* have in place procedures for post-conviction litigation of federal constitutional claims, and those procedures include the appointment of counsel to represent the prisoner. Derelictions and shortfalls on the part of post-conviction counsel do not establish cause in federal habeas proceedings to excuse a procedural default occurring in state court. *Coleman v. Thompson*, 501 U.S. 722 (1991). The courts of appeals have consistently refused to carve out exceptions to that rule.

The Sixth Circuit has now decided otherwise. In its view, the backlog of work in the State Public Defender's office, which led to the untimely filing of the prisoner's state post-conviction motion, constituted cause for the ensuing procedural default. That result is at odds with decisions of the Court and of other federal courts of appeals.

Moreover, the rule underlying the court's decision is unworkable. If a supposed backlog of work can be cause, three outcomes are possible: the States will be compelled to increase the funding for defender services; the state courts will be pushed to excuse defaults allegedly stemming from an attorney's workload; and federal courts will have to conduct evidentiary hearings for prisoners to establish the factual basis of the tendered excuse. The first result may be desirable as a matter of public policy, but more funding for criminal defense services at the post-conviction stage is not a constitutional mandate. The

second consequence infringes the States' interest in the finality of criminal convictions. The third possibility will ensnare the federal courts in a never-ending scrutiny of state defender services in an effort to determine an undefined, but "acceptable," level of backlog and delay in representing state post-conviction applicants. In the absence of a violation of the Constitution, there is no room for such far-reaching federal supervision.

STATEMENT

After trial in the Court of Common Pleas, respondent David Paris was convicted of felonious assault, in violation of Ohio Revised Code § 2903.11. He was sentenced to a term of eight to fifteen years imprisonment. The Ohio Court of Appeals affirmed the conviction. Pet. App. 27a.

1. In the state court of appeals, Stephen Schutte was appointed to represent Paris. The state court affirmed Paris' conviction on March 26, 1992. Schutte did not tell Paris of the outcome; Paris learned of the affirmance in July 1992. At that point, Paris contacted the State Public Defender and requested counsel. It was not until August 1995 that the assistant public defender assigned to Paris' case moved to reopen the decision of the court of appeals, invoking Ohio Appellate Rule 26(B), alleging that Schutte had provided ineffective assistance on appeal.[1] To justify the filing of the motion beyond the 90 day period allowed

[1] Under Ohio law, an allegation that counsel provided ineffective assistance on direct appeal can be raised only by a motion to reopen the judgment of the court of appeals. Ohio App. R. 26(B)(1). *See State v. Murnahan*, 63 Ohio St. 3d 60, 65-66, 584 N.E.2d 1204, 1208-09 (1992).

by the rule, the assistant public defender cited his large caseload and the need to complete work on other cases. The court of appeals denied the motion, holding that Paris had not shown "good cause" for the late filing. Pet. App. 47a-48a. On Paris' appeal, the Ohio Supreme Court affirmed. Pet. App. 44a-45a.

2. Paris applied for federal habeas corpus in October 1996, repeating his claim that Schutte had been constitutionally ineffective, having failed to advance on appeal a challenge to the admission of certain hearsay evidence. Pet. App. 26a-27a. The district court held that Paris' claim was procedurally barred in light of his failure to comply with the time requirements of Rule 26(B). Schutte's failure to tell Paris that his conviction had been affirmed was immaterial. The state courts, in holding the motion untimely, had instead pointed to the three year lapse of time after the Public Defender had accepted Paris' case. Relying on *Coleman v. Thompson*, 501 U.S. 722 (1991), the district court decided that whatever error was attributable to the assistant public defender did not establish cause to excuse the default in federal habeas. Pet. App. 24a, 30a-31a, 42a-43a.

3. The district court issued a certificate of appealability, and in the ensuing appeal, the court of appeals affirmed. Rule 26(B) was an independent and adequate state ground, and Paris' failure to meet the 90 day time limit was sufficient to bar his claim in federal habeas corpus. Pet. App. 19a-20a. Paris, moreover, could not establish cause for the default: the default was not related to Schutte's failure to tell Paris that his conviction had been affirmed. It was instead tied to the three years that had passed before the Public Defender filed the motion.

Under *Coleman*, the Public Defender's action (or inaction) did not constitute cause. Pet. App. 20a-21a.

On Paris' motion for rehearing, a divided panel reversed the decision of the district court. Schutte, in the majority's view, had rendered ineffective assistance because he had not told Paris of the result or "how to further appeal." Schutte's post-decision inaction thus constituted cause. Pet. App. 5a. The backlog at the Public Defender's office also amounted to cause, Paris not being told of the risk of delay. Pet. App. 6a. Because the majority had already decided that, on the merits, Paris was right in charging that Schutte had been ineffective on appeal, Paris was ordered retried or released. Pet. App. 2a-3a, 6a.

The dissenting judge argued that after his direct appeal had been decided, Paris had no right to counsel. Because Paris had no right to counsel, it followed that he had no right to effective counsel. Under *Coleman*, the ineffectiveness of counsel could not be cause if Paris had no right to counsel. Schutte's failure to communicate with Paris and the Public Defender's workload, occurring at a time when Paris had no right to counsel, were thus insufficient to establish cause. Pet. App. 7a. To decide that Paris had demonstrated actual prejudice, the majority had misread state evidentiary law and had overlooked Paris' own testimony that he had struck the victim. Pet. App. 9a-10a, 11a.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals that Paris established cause for his procedural default rests on three points: the state Public Defender did not tell Paris that work on his case would be delayed; Schutte did not tell Paris that his conviction had been affirmed; and Schutte also did not tell Paris of potential post-conviction remedies (presumably including Rule 26(B)). From this, the court concluded that Schutte had been constitutionally ineffective and that it would be "unfair" to hold Paris responsible for the delay occasioned by the Public Defender. Those conclusions are in square conflict with decisions of this Court and of the other federal courts of appeals.

a. Without question, Paris had no right to counsel in the state post-conviction proceedings.[2] *Murray v. Giarratano*, 492 U.S. 1, 7-9 (1989) (plurality); *Pennsylvania v.*

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[2] The state Public Defender was not appointed in the state courts – and under state law, was not required – to represent Paris. *See Zuern v. Tate*, 938 F.Supp. 468, 471 (S.D. Ohio 1996) (reviewing Ohio post-conviction procedure in light of 28 U.S.C. § 2261); *State v. Crowder*, 60 Ohio St. 3d 151, 152-53, 573 N.E.2d 652, 654 (1991); *State ex rel. McMinn v. Office of the Public Defender*, 26 Ohio App. 3d 16, 17, 497 N.E.2d 1382, 1383 (1985); Ohio Rev. Code Ann. § 120.06(B).

The Sixth Circuit has recently decided that prisoners such as Paris have a right to counsel (and perforce, a right to the effective assistance of counsel) in proceedings under Rule 26(B). *White v. Schotten*, 201 F.3d 743, 751-52 (6th Cir. 2000). The court of appeals is presumably more familiar with Ohio law (*Selvage v. Collins*, 494 U.S. 108, 109-10 (1990)), but in this instance, the Sixth Circuit has misread state law. Rule 26(B) is a specific post-conviction remedy, intended to reach only claims of ineffective assistance on the part of appellate counsel. *State v. Robinson*, 74

Finley, 481 U.S. 551, 555-57 (1987). He could not, therefore, make out a claim of ineffective assistance of counsel in the post-conviction context. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). In turn, Paris could not advance, as cause, the quality of his representation by the Public Defender.

If the Sixth Circuit is viewed to say that the heavy caseload of the Public Defender's office itself amounted to cause for the default, the Seventh Circuit has held directly otherwise. *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995). *See Sceifers v. Trigg*, 46 F.3d 701, 704 (7th Cir.), *cert. denied*, 516 U.S. 853 (1995) (delay in state post-conviction action, caused by state public defender and appointed counsel, not attributable to state); *Lane v. Richards*, 957 F.2d 363, 365 (7th Cir.), *cert. denied*, 506 U.S. 842 (1992) (same). *Cf., e.g., Shipp v. General Motors Corp.*, 750 F.2d 418, 428 & n.12 (5th Cir. 1985) (workload of attorney does not constitute excusable neglect under Fed. R. App. Pro. 4(a)); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 456 U.S. 979 (1982) (same as to Fed. R. Civ. Pro. 6(b)). If the Public Defender's failure to tell Paris of the backlog of work was thought to defeat some expectation on Paris' part, thus excusing him from the

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Ohio St. 3d 1518, 660 N.E.2d 472 (1996); *Murnahan*, 63 Ohio St. 3d at 65-66, 584 N.E.2d at 1209. *See also State v. Herrera*, 183 Ariz. 642, 645-46, 905 P.2d 1377, 1380-81 (Ariz. Ct. App. 1995) (listing states with similar procedure). In any event, the Sixth Circuit in this case decided only that delay on the part of the Public Defender amounted to cause; the extension of the right to counsel to Rule 26(B) proceedings was not presented to (or decided by) the court of appeals.

resulting default, that notion finds no support in the decisions of this Court. The prisoners in *Coleman* and *Torna* also had reasonable expectations that their respective attorneys would file the particular papers in a timely manner. In both cases, the Court decided that the prisoner shouldered the risk that counsel would miss the deadline. *Coleman*, 501 U.S. at 753-54; *Torna*, 455 U.S. at 588 n.4. The courts of appeals have shown no inclination to excuse procedural defaults occasioned by the failure of post-conviction counsel to meet a deadline: efforts to distinguish *Coleman* because counsel was court-appointed, the prisoner did not know of the deadline, the prisoner relied on his attorney, or counsel disregarded his client's instructions have all been rebuffed.[3]

b. Schutte certainly had a responsibility to advise Paris of the outcome of the appeal; the professional conduct rules require as much.[4] What Schutte did or did not do, though, is immaterial. In the state courts, Paris advanced only the delay engendered by the Public Defender as the explanation for his untimely filing; that is

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[3] *Fairman v. Anderson*, 188 F.3d 635, 642-43 (5th Cir. 1999); *Lamp v. State of Iowa*, 122 F.3d 1100, 1105 n.5 (8th Cir. 1997); *Miller v. Lock*, 108 F.3d 868, 871 (8th Cir. 1997); *Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995); *Shigemura v. Groose*, 45 F.3d 250, 252-53 (8th Cir.), *cert. denied*, 516 U.S. 855 (1995). *Cf. Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999) (attorney's error in calculating limitations period under 28 U.S.C. § 2244(d) not excusable under equitable tolling).

[4] *See Cleveland Bar Ass'n v. Tolliver*, 75 Ohio St. 3d 178, 661 N.E.2d 1055 (1996); *Office of Disciplinary Counsel v. Cox*, 58 Ohio St. 3d 124, 568 N.E.2d 1219 (1991); Model Rules of Professional Conduct, Rule 1.4(a).

the only explanation that could be considered by a federal court. *Crank v. Duckworth*, 969 F.2d 363, 366 (7th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993). The federal courts are to defer to the enforcement of state procedural rules by the state courts, that deference being necessary to foster the principles of comity and finality. That deference also minimizes the institutional and fiscal costs associated with federal habeas litigation. *E.g., Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Engle v. Isaac*, 456 U.S. 107, 127-29 (1982). A federal court does not further those aims when it excuses a procedural default on the basis of an explanation not given to the state courts. *Cf. Murray v. Carrier*, 477 U.S. 478, 489 (1986) (exhaustion doctrine requires presentation of claim of ineffective assistance being asserted as cause for procedural default).

This case, in fact, illustrates the danger of federal courts intruding into questions of state procedure. Ohio was not required to provide Paris with a lawyer to pursue his post-appeal remedy. The State instead chose to make a lawyer available, believing that the post-conviction process would lead to more reliable results.[5] The Sixth Circuit uses the "ineffective assistance" of that lawyer to excuse a procedural default under state law. The court can then overturn a conviction on the grounds that Paris' trial counsel (and the state trial judge) made an error of state evidentiary law, a question of state law that the federal court could not have reached directly. *See Estelle v.*

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[5] *See McFarland v. Scott*, 512 U.S. 849, 855-56 (1994); *Giarratano*, 492 U.S. at 12 n.7 (plurality); *Boyd v. Dutton*, 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting).

McGuire, 502 U.S. 62 (1991). The procedural default doctrine works to keep such federal intervention to a minimum, forcing state prisoners to comply with state procedure to ensure that the state courts have the first chance to correct errors of both state and federal law. *E.g.*, *O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1734 (1999). If the state courts decide that the prisoner has run afoul of state procedure, federal habeas review is generally foreclosed. The usual exception, of course, occurs if, *inter alia*, the prisoner can show cause for the default. The Court in *Carrier* was careful not to articulate "an exhaustive catalog" of what might constitute cause. 477 U.S. at 488. Cause, however, is simply shorthand for saying that an independent violation of federal rights (or at the least, conduct imputed to the State) led to the default;[6] in that situation, the federal interest in unimpeded access to the federal courts outweighs any state interest in procedural regularity and finality. This is the import of *Coleman* and, in the context of abusive habeas petitions, *McCleskey v. Zant*, 499 U.S. 467 (1991);[7] this definition of cause also explains the refusal of the federal courts to find cause when the performance of post-conviction counsel fell below a standard set, not by the federal Constitution, but

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[6] *See Strickler v. Greene*, 119 S.Ct. 1936, 1949 (1999); *McCleskey v. Zant*, 499 U.S. 467, 501-02 (1991) (noting information at issue not concealed by prosecution); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). A prisoner might establish cause if the legal basis for his claim "was not reasonably available to counsel," *Carrier*, 477 U.S. at 488, but in light of the retroactivity doctrine announced in *Teague*, the prisoner's claim will nonetheless fail. *See Gacy v. Welborn*, 994 F.2d 305, 310-11 (7th Cir.), *cert. denied*, 510 U.S. 899 (1993).

[7] *See also Antone v. Dugger*, 465 U.S. 200, 205 n.3 (1984).

by state law or by federal statute.[8] Attorney error, to amount to cause, thus must constitute ineffective assistance under the Sixth Amendment.

The result reached by the Sixth Circuit is at odds with the interests furthered by the procedural default doctrine. Most states establish deadlines for the filing of post-conviction actions, and a failure to meet the deadline can be excused for various reasons.[9] The parameters of what will excuse non-compliance should be developed, in the first instance, by the state courts, not a federal court when there is no federal constitutional violation related to the default itself. The federal court is in no better position than is the state court to make that decision; unless the default on its own implicates a federal right, there is no superior federal interest to be vindicated. Without the default stemming from the infringement of a federal right, the Sixth Circuit has done no more than impose its views about what constitutes, under Ohio law, a permissible reason for not meeting the 90 day deadline of Rule 26(B). If the States "wish to detain those whom

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[8] *Weeks v. Angelone*, 176 F.3d 249, 273-74 (4th Cir. 1999), *aff'd on other grounds*,120 S.Ct. 727 (2000); *Callins v. Johnson*, 89 F.3d 210, 212-13 (5th Cir.), *cert. denied*, 519 U.S. 1017 (1996) (federal habeas counsel appointed under 21 U.S.C. § 848(q)); *Bonin v. Calderon*, 999 F.2d 425, 430-31 (9th Cir. 1993).

[9] *E.g.*, Del. Super. Ct. Crim. R. 61(i)(1), (5); 725 Ill. Stat. Comp. Ann. § 5/122-1(c); Md. Code Ann. art. 27, § 645A(a)(2)(ii); Or. Rev. Stat. § 138.510(2); S.C. Code Ann. § 17-27-45; Tenn. Code Ann. § 40-30-202; Utah Code Ann. § 78-35a-107(3).

they convict,"[10] they should not be expected to relax their procedural rules because a federal court has found a non-constitutional reason that excuses the default.

c. As irresponsible as Schutte may have been, his deficiency did not violate the Constitution. The Sixth Amendment imposes no duty on counsel to tell his client that he can challenge the adequacy of representation, but must do so within a fixed time. That principle parallels the rule that counsel has no constitutional duty to tell a defendant of his appeal rights following a guilty plea unless counsel has some reason to believe his client is interested in an appeal.[11] Requiring counsel to tell his client of the post-conviction process would often be confusing, create false hopes, and encourage frivolous post-conviction actions. *See Austin v. United States*, 513 U.S. 5, 8 (1994). Paris lost no more than an opportunity to move to reopen his appeal within the 90 days set out in the rule, an opportunity little different than the opportunity to file a petition for a writ of certiorari in this Court. The loss of that chance, whether caused by bad advice from counsel, no advice, or sheer neglect, does not run afoul of any constitutional provision. *Torna*, 455 U.S. at 587-88 & n.4. *See Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974); *Miller*, 108 F.3d at 871; *Miller v. Keeney*, 882 F.2d 1428, 1431-33 (9th Cir. 1989); *United States v. Eisenhardt*, 10 F.Supp.2d 521, 522 (D. Md. 1998); *United States v. Ferrell*, 730 F.Supp. 1338, 1340 (E.D. Pa. 1989).

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[10] *Fay v. Noia*, 372 U.S. 391, 470 (1963) (Harlan, J., dissenting).

[11] *See Roe v. Ortega*, 120 S.Ct. 1029 (2000).

2. The States bear the costs of federal habeas corpus;[12] the rule underlying the decision of the Sixth Circuit will impose additional institutional and fiscal costs. The States have considerable latitude in crafting post-conviction procedures, including whether to provide counsel. *Giarratano*, 492 U.S. at 11 (plurality); *Finley*, 481 U.S. at 559. As a matter of public policy, the States have generally decided to do so. *E.g.*, 725 Ill. Comp. Stat. Ann. § 5/122-2.1(a)(1); Ind. Code Ann. § 33-1-7-2(a); Ky. Rev. Stat. Ann. § 31.110(2)(c); La. Code Crim. Proc. Ann. art. 930.7; Mont. Code Ann. § 46-21-201; N.C. Gen. Stat. § 7A-451(a)(3); S.C. Code Ann. § 17-27-60; Wash. Rev. Code Ann. § 10.73.150.

Complaints that public defender services are underfunded or overwhelmed by the volume of cases are not unknown or infrequent.[13] If, as the Sixth Circuit has decided, an attorney's excessive caseload amounts to

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[12] *Coleman*, 501 U.S. at 738-39; *Teague*, 489 U.S. at 309-10; *Engle*, 456 U.S. at 127-28.

[13] *In re Certification of Conflict*, 709 So.2d 101 (Fla. 1998); *Skitka v. State*, 579 So.2d 102 (Fla. 1991); *Platt v. State*, 664 N.E.2d 357 (Ind. App. 1996), *cert. denied*, 520 U.S. 1187 (1997); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *State v. Bianco*, 103 N.J. 383, 388, 511 A.2d 600, 603 (1986); *Castro v. State*, 880 P.2d 387, 391 (Okla. Crim. App. 1994), *cert. denied*, 514 U.S. 1024 (1995); J. Arango, *Defense Services for the Poor*, 12 Crim. Just. 49 (Spring 1997); D. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329 (1995); *Low-Bid Criminal Defense Contracting: Justice in Retreat*, 21 Champion 22 (Nov. 1997); R. Scheider, Jr., Comment, *A Measure of Our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 Me. L. Rev. 335, 375-78, 393-94 (1996); D. Wilson, Casenote, 22 Wm. Mitchell L. Rev. 1117, 1132-41 (1996).

cause, that rule will apply to a significant number of prisoners. Faced with a prisoner who seeks to excuse his procedural default because of his attorney's workload, a state court has three possible responses. The simplest is to refuse to excuse the default; the state court may conclude that the chance the prisoner will seek federal habeas relief is too small to warrant any revamping of state procedure, including providing more resources for defender services. D. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1153 (1986). *Cf. Coleman*, 501 U.S. at 738 (noting state courts have interest in ensuring decisions are respected by federal courts, but institutional and fiscal costs mostly borne by State). The second response is for the state court to excuse the default, believing it to be expedient to reach the merits of a claim that could be reached in federal habeas proceedings. Meltzer, 99 Harv. L. Rev. at 1156-57, 1193. That outcome, perhaps less intrusive now in light of the provisions of 28 U.S.C. § 2254(d)(1), is certainly perverse in light of the oft-stated purposes of the procedural default doctrine – reducing the burden of relitigation, ensuring compliance with state procedure, and enhancing the finality of criminal convictions. The third response is for the state court to declare the existing funding level inadequate. Wilson, 22 Wm. Mitchell L. Rev. at 1160. Additional resources for public defenders might be desirable as a matter of public policy, but the sums involved would not be negligible.[14] This result is also at odds with the

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[14] The public defender in Minneapolis sought an additional $5 million in 1992; the Oklahoma legislature in 1997 had to fund a shortfall of more than $2 million. *See Kennedy*, 544 N.W.2d at 4-5; Arango, 12 Crim. Just. at 49. *See also* Vick, 43 Buff. L. Rev. at

concept of federalism that has guided the Court's habeas jurisprudence for the last 20 years: under the guise of excusing a procedural default, a federal court can impel the State to allocate resources in a manner that court deemed proper. That result finds no support in *Finley* and *Giarratano* and would represent an amazing expansion of federal habeas jurisdiction. *Cf. Lewis v. Casey*, 518 U.S. 343, 381-82, 385-88 (1996) (Thomas, J., concurring).

3. The Court has noted the need for certainty and consistency in federal habeas litigation. *See Lonchar v. Thomas*, 517 U.S. 314, 322-23, 323-24 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 443 (1995); *McCleskey*, 499 U.S. at 496. In light of the number of federal habeas actions filed by state prisoners, the Court has also been sensitive to the demands such litigation places upon the States and the federal judiciary. *O'Neal*, 513 U.S. at 443; *Carrier*, 477 U.S. at 487-88; *Rose v. Mitchell*, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment). *See Custis v. United States*, 511 U.S. 485, 496 (1994); *McCleskey*, 499 U.S. at 491. The practical effect of the decision by the Sixth Circuit will undercut both of these interests.

a. Under *Carrier* and *Coleman*, questions of cause, based on counsel's conduct, are easily resolved: the derelictions of post-conviction counsel do not amount to cause (*Coleman*), and unless counsel's performance is constitutionally inadequate, his ignorance or inadvertence does not constitute cause (*Carrier*). Those bright-line rules aid in reducing the seeming complexity of federal habeas

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433-38 (arguing that compensation limits in place in South Carolina and Oklahoma for capital cases are "far below what is necessary" for "meaningful defense").

actions. In turn, a case that, by virtue of the application of a clear legal rule, has become streamlined can be decided more quickly than a complex case.

The Sixth Circuit, however, adds unwarranted complexity to federal habeas litigation. It would be the rare case in which the defendant's lawyer could not ascribe his error to a heavy workload. *See United States v. Perez*, 116 F.3d 840, 851 (9th Cir. 1997) (Kleinfeld, J., concurring in judgment) ("Preparation for trial is potentially infinite, but time is most assuredly finite."). In order to determine whether there was cause for the default, supposedly based on counsel's workload, the federal courts "would routinely be required to hold evidentiary hearings." *Carrier*, 477 U.S. at 487. If analogous cases – such as a State's satisfaction of the criteria set out in 28 U.S.C. § 2261 – are any indication, those hearings will not be perfunctory exercises. *See Hill v. Butterworth*, 941 F.Supp. 1129, 1144-47 (N.D. Fla. 1996), *rev'd*, 147 F.3d 1333 (11th Cir. 1998); *Booth v. Maryland*, 940 F.Supp. 849, 854 (D. Md. 1996), *vacated*, 112 F.3d 139 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 2063 (1998). *Cf. Harris v. Champion*, 15 F.3d 1538, 1548-53 (10th Cir. 1994) (describing proceedings in challenge to state direct appeal process). Though district judges might be able "to minimize the burdens to all concerned," the Court should not assume that there would be a negligible effect upon the States or the federal courts. *Carrier*, 477 U.S. at 487. *See McCleskey*, 499 U.S. at 491; *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring); *In re Certification of Conflict*, 636 So.2d 18, 22 (Fla. 1994) (noting need for hearing in light of number of cases and substantial financial impact). Instead, "an infinite continuum of litigation," focused only on the workload of

counsel who represented the prisoner at a particular time, will result. *Bonin*, 999 F.2d at 429. The inquiry itself will infringe on the actions of defense counsel, prosecutors asking to oversee counsel's work to ensure against subsequent intervention by a federal court and judges asking if counsel were truly overworked or simply dilatory. *See Perez*, 116 F.3d at 852-53 (Kleinfeld, J., concurring in judgment); *In re Certification of Conflict*, 636 So.2d at 23 (Harding, J., concurring) ("The issue here is who should exercise authority and make decisions about whether the public defender has the resources to perform all the responsibilities required by law. Except in the most unusual circumstances, I would leave that decision with the public defender and as a court would not second-guess it."). At the end of the inquiry, the ultimate question raised by the prisoner – the reliability of his conviction – will still be unanswered. *Cf. Withrow v. Williams*, 507 U.S. 680, 701 (1993) (O'Connor, J., concurring in part, dissenting in part) ("the judiciary suffers because its processes are diverted from the central mission of ascertaining the truth"); *Boyd*, 405 U.S. at 7-8 (Powell, J., dissenting) ("little likelihood" that new evidentiary hearing, eight years after guilty plea, "will be conducive to dependable factfinding"). Without furthering the goals of the federal courts' habeas jurisdiction, the repeated litigation engendered by the decision of the Sixth Circuit nonetheless impairs the States' interest in finality and will stretch already scarce federal judicial resources. *See McCleskey*, 499 U.S. at 491-92. Because the rule underlying the decision of the court of appeals carries significant costs without providing substantial benefits, it has no

place in federal habeas jurisprudence. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993).

b. The rule, moreover, is standardless, making it difficult, if not impossible, for federal judges to apply and for the States to understand. If cause is to be based on workload, there is, as the Florida courts have discovered, no "accepted methodology to determine the maximum annual caseload for capital lawyers." *Hill*, 941 F.Supp. at 1156. In the context of non-capital litigation, caseload standards vary among the States. *In re Certification of Conflict*, 636 So.2d at 26-27. *See Rodriquez v. State*, 700 So.2d 79, 84 (Fla. App. 1997) (appellate public defender should average four to six briefs each month). Workload and any attendant delay might often stem from underfunding, but inefficient management is just as likely to be the cause. *Hill*, 941 F.Supp. at 1147 n.36; *Rodriquez*, 700 So.2d at 82-83; *Castro*, 880 P.2d at 391 ("this Court is not a forum to resolve inter-office shortcomings"). To the prisoner, delay is delay, but the management skills of a public defender can hardly be " 'imputed to the State.' " *Coleman*, 501 U.S. at 754. If, instead, cause is based on the extent of any delay, there is no obvious standard by which to judge what lapse of time is permissible. Three years, the amount of time that passed in this case, is presumably too long, but the Sixth Circuit does not imply what amount of time would be permissible. The absence of any clear standards demonstrates that the rule announced in this case is not "a sound and workable means of channeling the discretion of federal habeas courts." *Carrier*, 477 U.S. at 497.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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